Office Supreme Court, U. S.
FILED.
DEC 31 1907
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 166.

B. F. ASBELL, PLAINTIFF IN ERROR,

vs.

THE STATE OF KANSAS.

BRIEF OF APPELLEE.

(20,481.)

E. L. BURTON,
Attorney for Appellee.

C. E. PILE,
W. B. GLASSE,
Of Counsel.

IN THE SUPREME COURT

OF THE

UNITED STATES

B. F. ASBELL, Appellant,

vs.

THE STATE OF KANSAS, Appellee.

No. 20,481.

BRIEF OF APPELLEE.

STATEMENT OF CASE.

The appellant in this case, B. F. Asbell, a citizen of the State of Kansas, was convicted in the District Court of Labette county, Kansas, of the offense of having violated the provisions of an act of the legislature of that state entitled:

"An Act for the protection of domestic animals, and repealing sections 7421, and 7423, and article 10 of chapter 105 of the Compiled Laws of Kansas, of 1901, and all acts and parts of acts in conflict herewith, and providing penalties for the violation thereof,—" being Chapter 495 of the Session Laws of 1905.

Section 27 of said Act is as follows:

"Section 27. It shall be unlawful for any person, or persons, to bring, drive or transport any cattle into any county of the State of Kansas except for immediate slaughter, as provided in the preceding section, from any point south of the south line of Kansas,

without having first caused such animal or animals to be inspected and passed under certificate of health by the live-stock sanitary commissioner of this state, or some inspector thereof, duly authorized by such commissioner, or by the bureau of animal industry of the Interior Department of the United States government; and any person or persons violating the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than fifty nor more than one thousand dollars, or by imprisonment in the county jail not less than thirty days, nor more than one year, or by both such fine and imprisonment."

After the return of a verdict of guilty, the hearing and overruling of a motion for new trial, and the hearing and overruling of a motion in arrest of judgment the trial court pronounced judgment against the appellant, there defendant, as follows:

"It is therefore by the court considered, ordered, adjudged and decreed that the defendant be confined in the county jail of Labette county, Kansas, for the period of thirty days, and that he pay a fine to the state of Kansas in the sum of $500, and pay the costs of this action taxed at $ . . . . . , and that he be committed to the custody of the sheriff of Labette county, Kansas, until the said decree and judgment of the court be fully carried out or he be discharged by due course of law."

After the pronouncing of this judgment the defendant appealed the case to the Supreme Court of the State where the judgment of the trial court was affirmed.

It is the affirmance of this judgment that is here complained: the assigned errors being in substance:

"The Supreme Court of Kansas erred in holding and deciding that section 27, of chapter 495, Session Laws of Kansas 1905, was valid."

* * * * * * *

Said error is more particularly set forth as follows:

The Supreme Court of Kansas erred in holding and deciding—

FIRST: That said section 27 was not an unreasonable re-

striction upon interstate commerce, as guaranteed by Section 8, Article 1, of the Constitution of the United States, and—

SECOND: In holding and deciding that said section did not violate that part of Section 2, Article 4, of the Constitution of the United States, which reads: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

In the assignment of the errors it is recited, truthfully, that: "The validity of said section was denied and drawn in question by the defendant on the ground of its being repugnant to the Constitution of the United States, and in controvention thereof."

ARGUMENT.

This Act is simply an *inspection law*, and falls clearly within the scope of police regulation; and we note that the errors assigned challenge *only* the validity of Sec. 27 of the Act of which it is a part. And whether the punishment prescribed by that section is reasonable or unreasonable, or is a reasonable or unreasonable restriction on interstate commerce, is dependant on the duties imposed on the citizen, and the provisions of the Act which prescribe the duty, the performance of which exempt him from its penalties, or point out a way by which he may avoid the punishment prescribed. Two of these provisions are prescribed in the very section complained of. They are: (1), "Having first caused such animal or animals to be *inspected* and passed under certificate of health by the Livestock Sanitary Commissioners of this state, or some inspector thereof, duly authorized by such commissioner; or (2), by the Bureau of Animal Industry of the Interior Department of the United States government."

The third requirement of the citizen is provided and found in section 29 of the Act, and is simply that he *present* his stock to the *patrolmen* or *inspectors* for examination and *inspection*. These patrolmen or inspectors are provided for in section 28 of the Act, and it is made their duty to patrol the south line of the state and supervise the movement of cattle from south of the south line of the state.

These are all the things that are required of any citizen who desires to bring cattle into this state from the territory south of it. He is simply required to have his cattle *inspected* and that can be done by the patrol with little inconvenience to the citizen, and the *expense of the inspection* is borne by the state, when it does the inspecting; and when the inspecting is done by the Bureau of Animal Industry of the Interior Department, it is difficult to see why the citizen should complain of the law of the state of Kansas. The act of congress creating this bureau invites the co-operation of the states in the protection of their domestic animals from contagious diseases. It was and is a fact well known throughout the state of Kansas that cattle brought into it from territory south was and is liable to communicate disease to cattle kept in the state; and with such knowledge this law was passed. And it does not contravene any law of congress nor encroach on the right of congress to regulate interstate commerce. Indeed it is in aid of the law of congress and allows any citizen to invoke the action of the Bureau of Animal Industry of the Interior Department. And if the cattle were found to be free from southern ticks they could come into the state freely; but if they were found to bear such vermin the state had the right to keep them out. And while the state had the right to *inspect*, and while it is its *duty to inspect*, and thus protect its stock against contagious or infectious diseases, it is difficult to see how such inspection could be had with less inconvenience or less expense to the citizen. The reasonableness of the law should not be questioned by any citizen of the state of Kansas.

STATE MAY INSPECT. AUTHORITIES.

That the state may pass inspection laws has often been decided and clearly held by this court; and for the convenience of the court we cite and quote from the following: In the case of—

Patapsco Guano Company, Appt., vs. Board of Agriculture of North Carolina, et al., 171 U. S. 345, it is said:

"Inspection laws are valid when they act on a subject before it becomes an article of commerce, and also when, although operating on articles brought from one state into another, they pro-

vide for inspection in the exercise of that power of self-protection commonly called the police power.

Interstate as well as foreign commerce is subject to a state inspection law."

In the opinion in this case Mr. Chief Justice Fuller, after stating the facts, says:

"Whenever inspection laws act on the subject before it becomes an article of commerce they are confessedly valid, and also when, although operating on articles brough from one state into another, they provide for inspection in the exercise of that power of self-protection commonly called the police power.

No doubt can be entertained of this where the inspection is manifestly intended, and calculated in good faith, to protect the public health, the public morals, or the public safety. Minnesota v. Barber, 136 U. S. 313 (34:455, Inters. Com. Dep. 175). And it has now been determined that this is so, if the object of the inspection is the prevention of imposition on the public generally."

In the case of—

Mo. K. T. Ry. Co., Plaintiff in Error v. Charles Haber et al., 169, U. S. 613, it is said:

"The power of the states to protect their domestic cattle from contagious diseases was left untouched and unimpaired by the act of Congress of March 29, 1884.

Nor is said statute of Kansas a regulation of commerce among the states simply because it may incidentally affect such commerce."

In the opinion in this case Mr. Justice Harlan, after stating the facts, says:

"The act of congress did not assume to give any corporation, company, or person the affirmative right to transport from one state to another state cattle that were liable to impart or capable of communicating contagious, infectious, or communicable diseases. On the contrary, it was made a misdemeanor to deliver for transportation or to transport or drive from one state to another cattle known to be affected with contagious, infectious, or communicable diseases."

These cases all proceed upon the ground that the regulation of the enjoyment of the relative rights, and the performance of the duties, of all persons within the jurisdiction of a state belongs primarily to such state under its reserved power to provide for the safety of all persons and property within its limits; and that even if the subject of such regulations be one that may be taken under the exclusive control of Congress, and be reached by national legislation, any action taken by the state upon that subject that does not directly interfere with rights secured by the Constitution of the United States or by some valid act of Congress must be respected until Congress intervenes."

In the case of—

Morgan's Louisiana and Texas R. R. and Steamship Co., Plff. in Error v. Board of Health of the State of Louisiana, and State of Louisiana, 118 U. S. 455, it is said:

"The system of quarantine laws established by Statutes of Louisiana is a rightful exercise of the police power for the protection of health, which is not forbidden by the Constitution of the United States."

In the opinion in this case, Mr. Justice Miller, after stating the facts, says:

"In all cases of this kind it has been repeatedly held that when the question is raised whether the state statute is a just exercise of state power, or is intended by roundabout means to invade the domain of federal authority, this court will look into the operation and effect of the statute to discern its purpose. See — Henderson v. Mayor, 92 U. S. 259 (Bk. 23, L. ed. 543); Chy Lung Freeman, 92 U. S. 275 (Bk. 23, L. ed. 350); Cannon v. Orleans, 20 Wall. 577 (87 U. S. bk. 22, L. ed. 417).

But aside from all this, quarantine laws belong to that class of state legislation which, whether passed with intent to regulate commerce, or not, must be admitted to have that effect, and which are valid until displaced or contravened by some legislation of Congress.

The matter is one in which the rules that should govern it may in many respects be different in different localities, and for

that reason be better understood and more wisely established by the local authorities. The practice which should control a quarantine station on the Mississippi River, a hundred miles from the sea, may be widely and wisely different from that which is best for the Harbor of New York."

In the case of—

Patterson v. Commonwealth of Kentucky 97th U. S. 501, this court quotes approvingly from Cooley on Constitutional Limitations, where he says:

"In the American constitutional system the power to establish the ordinary regulations of police has been left with the individual States, and can not be assumed by the national government. . . . If the power only extends to a just regulation of rights, with a view to due protection and enjoyment of all, and does not deprive any one of that which is justly and properly his own, it is obvious that its possession by the state, and its exercise for the regulation of the property and actions of its citizens, can not well constitute an invasion of national jurisdiction or afford a basis for an appeal to the protection of the national authority." Cooley Const., Lim. 574. And in addition this court says:

"While it is confessedly difficult to mark the precise boundaries of that power, or to indicate, by any general rule, the exact limitations which the states must observe in its exercise, the *existence* of such power *in the States* has been *uniformally recognized in this court.*"

In the case of—

Kammish v. Ball, 129 U. S. 217, this court took notice of the fact, which, by the way, is current history, that cattle in the territory south of Kansas, are liable to communicate what is commonly known as Texas fever. In this case Mr. Justice Field says:

"That cattle coming from those sections of the country during the spring and summer months are often infected with a contagious and dangerous fever is a notorious fact; as is also the fact that cold weather, such as is usual in the winter north of the southern boundary of Missouri and Kansas, destroys the virus of

the disease, and this removes all danger of infection. It is upon these notorious facts that the legislation of Iowa for the exclusion from their limits of these cattle, unless they have passed a winter north, is based. See Missouri Pac. R., Co., v. Finley 38 Kan. 556, also First Annual Report to the Commissioners of Agriculture, of the Bureau of Animal Industry for 1884, p. 426, and Second Annual Report of same Bureau for 1885, p. 310."

PRIVILEGES OF CITIZENS, ETC.

I do not deem it necessary to discuss that part of the errors assigned charging a violation of Sec. 2, of Act. 4, of the Constitution which provides that:

"The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

In what is known as—

The Slaughter House Cases.

16 Wallace 26, this court, in construing this section of the constitution said:

"Its sole purpose was to declare to the several states, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction.

* * * * * *

Having shown that the privileges and immunities relied on in the argument are those which belong to citizens of the states as such, and that they are left to the state government for security and protection, and not by this article placed under the special care of the Federal Government, we may hold ourselves excused from defining the privileges and immunities of citizens of the United States which no State can abridge, until some case involving those privileges may make it necessary to do so."

In conclusion we desire to say that the State of Kansas had a right to pass reasonable inspection laws to protect its cattle against contagious and infectious diseases. That the inspection

law provided for is reasonable and does not unreasonably interfere with interstate commerce. That under the said provision of the Kansas statute any citizen of any of the states is entitled to all the privileges and immunities of the citizens of Kansas. Therefore, the decision of the Supreme Court of the State of Kansas should be affirmed.

Respectfully submitted,

E. L. BURTON,
Attorney for Appellee.

C. E. PILE,
W. B. GLASSE,
Of Counsel.

without having them first inspected, regardless of whether such cattle are infected or are perfectly healthy, is not a proper exercise of the police power.

This statute not only interferes with interstate commerce, but also conflicts with the United States statute and the rules and regulations of the Department of Agriculture. In cases of this kind where Congress has legislated on the subject such legislation is exclusive on that subject.

The Secretary of Agriculture has the power and authority, under the Federal statute, to promulgate rules and regulations for the transportation of cattle, and he does so, but the State of Kansas steps in and nullifies his orders by the passage of the statute under consideration, or rather attempts to do so. A statute attempting such a thing is unconstitutional and void.

Commodities which may lawfully become the subject of purchase, sale or exchange are articles of interstate commerce, within the protection of the commerce clause of the Constitution. *Leisy* v. *Hardin*, 135 U. S. 100; *Schollenberger* v. *Pennsylvania*, 171 U. S. 1; *In re Ware*, 53 Fed. Rep. 783; *Donald* v. *Scott*, 74 Fed. Rep. 859; *Sawrie* v. *Tennessee*, 82 Fed. Rep. 615; *In re Schietlin*, 94 Fed. Rep. 272; *Bennett* v. *American Express Co.*, 83 Maine, 236; *Ballock* v. *State*, 73 Maryland, 1; *S. C.*, 23 Am. St. Rep. 559.

A State has not the power to prevent the importation of lawful subjects of commerce. Cases *supra* and *Lyng* v. *Michigan*, 135 U. S. 161; *Hannibal &c. Ry. Co.* v. *Husen*, 95 U. S. 465; *Bowman* v. *Chicago &c. Ry. Co.*, 125 U. S. 489.

In this case defendant brought the cattle in question from the Indian Territory (now Oklahoma) into Kansas and proceeded with them to the railroad and shipped them to Missouri. He was engaged in interstate commerce, and was in possession of a lawful subject of interstate commerce. *State* v. *Duckworth*, 51 Pac. Rep. (Idaho) 456.

If the animals with which defendant was charged with bringing into the State were not diseased, they were lawful subjects of commerce. It was not charged that they were diseased; the

trial court charged the jury that it made no difference whether they were or were not diseased, and the Supreme Court of Kansas agreed with the trial court. Whether an article is or is not a subject of lawful interstate commerce depends upon the intrinsic state or condition of the article, and not upon a mere declaration of a state legislature. *In re Rahrer*, 140 U. S. 545.

This statute being a regulation of commerce under the guise of an inspection law, cannot be upheld, but must be condemned. *State of Minnesota* v. *Barber*, 136 U. S. 313; *Brimmer* v. *Rebman*, 138 U. S. 78; *Gulf. C. & S. F. Ry. Co.* v. *Hefley & Lewis*, 158 U. S. 99, 105.

Mr. E. L. Burton, Mr. C. E. Pile and *Mr. W. B. Glasse* for defendant in error:

The regulation of the rights and duties of all persons within the jurisdiction of a State belongs primarily to such State under its reserved power to guard the safety of persons and property within its borders, and even where the subject of such regulations is one over which Congress exercises exclusive control, any action of the State upon the subject which is not a direct interference with rights secured by the Constitution of the United States or by some valid act of Congress must be respected until Congress intervenes. *Patapsco Guano Co.* v. *Board of Agriculture of North Carolina*, 171 U. S. 345; *Minnesota* v. *Barber*, 136 U. S. 313; *M., K. & T. Ry. Co.* v. *Haber*, 169 U. S. 613; *Morgan's La. & Texas R. R. Co.* v. *Bd. of Health of La.*, 118 U. S. 455, and cases cited. See also *Patterson* v. *Kentucky*, 97 U. S. 501; *Kammish* v. *Ball*, 129 U. S. 217, and cases cited.

MR. JUSTICE MOODY delivered the opinion of the court.

A statute of the State of Kansas makes it a misdemeanor, punishable by fine or imprisonment, or both, for any person to transport into the State cattle from any point south of the south line of the State, except for immediate slaughter, without hav-

ing first caused them to be inspected and passed as healthy by the proper state officials or by the Bureau of Animal Industry of the Interior Department of the United States. Sec. 27, ch. 495, Session Laws of 1905. The plaintiff in error was duly charged by information in the state court with a violation of this statute, and found guilty by the verdict of a jury. The conviction was affirmed by the Supreme Court of the State, and the case is now here on a writ of error, allowed by the chief justice of that court. The only Federal question insisted upon in argument is whether the statute was a restriction of interstate commerce which was not within the power of a State to impose.

The obvious purpose of the law was to guard against the introduction into the State of cattle infected with a communicable disease. It undoubtedly restricts the absolute freedom of interstate commerce in cattle, but only to the extent that all cattle coming to cross the guarded boundary are subjected to inspection to ascertain whether or not they are diseased. If healthy they are admitted, if diseased they are excluded. The validity of such a restriction for such purposes has been frequently considered by this court, and the principles applicable to the settlement of the question have been clearly defined. The governmental power over the commerce which is interstate is vested exclusively in the Congress by the commerce clause of the Constitution, and therefore is withdrawn from the States. It is not now necessary to cite the many cases supporting this proposition, or to consider some expressions in the books somewhat qualifying its generality, because in carefully chosen words it has recently been affirmed by us. At this term, Mr. Justice Peckham, speaking for the court, said: "That any exercise of state authority, in whatever form manifested, which directly regulates interstate commerce, is repugnant to the commerce clause of the Constitution is obvious." *Atlantic Coast Line* v. *Wharton*, 207 U. S. 328, 334.

But though it may not legislate for the direct control of interstate commerce, the State may exercise any part of the legis-

lative power which was not withdrawn from it expressly or by implication by the scheme of government put into operation by the Federal Constitution. It may sometimes happen that a law passed in pursuance of the acknowledged power of the State will have an indirect effect upon interstate commerce. Such a law, though it is essential to its validity that authority be found in a governmental power entirely distinct from the power to regulate interstate commerce, may reach and indirectly control that subject. It was at an early day observed by Chief Justice Marshall that legislation referable to entirely different legislative powers might affect the same subject. He said in *Gibbon* v. *Ogden*, 9 Wheat. 194, 204:

"So, if a State, in passing laws on subjects acknowledged to be within its control, and with a view to those subjects shall adopt a measure of the same character with one which Congress may adopt, it does not derive its authority from the particular power which has been granted, but from some other, which remains with the State, and may be executed by the same means. All experience shows, that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical. Although the means used in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinct to establish their individuality.

"In our complex system, presenting the rare and difficult scheme of one general government, whose action extends over the whole, but which possesses only certain enumerated powers; and of numerous state governments, which retain and exercise all powers not delegated to the Union, contests respecting power must arise. Were it even otherwise, the measures taken by the respective governments to execute their acknowledged powers, would often be of the same description, and might, sometimes, interfere. This, however, does not prove that the one is exercising, or has a right to exercise, the powers of the other."